

**IN THE SUPREME COURT OF NIGERIA**  
**HOLDEN AT ABUJA**  
**ON FRIDAY, THE 30<sup>TH</sup> DAY OF JANUARY, 2026**  
**BEFORE THEIR LORDSHIPS**

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|--|--|
| <b><u>JOHN INYANG OKORO</u></b>          | <b><u>JUSTICE, SUPREME COURT</u></b>   |
| <b><u>HELEN MORONKEJI OGUNWUMIJU</u></b> | <b><u>JUSTICE, SUPREME COURT</u></b>   |
| <b><u>ADAMU JAURO</u></b>                | <b><u>JUSTICE, SUPREME COURT</u></b>   |
| <b><u>OBANDE FESTUS OGBUINYA</u></b>     | <b><u>JUSTICE, SUPREME COURT</u></b>   |
| <b><u>ABUBAKAR SADIQ UMAR</u></b>        | <b><u>JUSTICE, SUPREME COURT</u></b>   |
|  | <b><u>SC/1497<sup>C</sup>/2019</u></b> |

**BETWEEN:**

**NIGERIAN ARMY**

**APPELLANT**

**VS.**

**MAJOR GENERAL I. SANI**

**RESPONDENT**

**JUDGMENT**

**(DELIVERED BY OBANDE FESTUS OGBUINYA, JSC)**

This appeal probes into the rightness of the decision of the Court of Appeal, Abuja, Division (hereunder addressed as “the lower court”), *coram judice*: A. D. Yahaya, T. Akomolafe-Wilson and P. O. Ige, JJCA, in Appeal No. CA/A/791<sup>C</sup>/2017, delivered on the 18<sup>th</sup> April, 2019. In its judgment, the lower court set aside the decision of the Special Court Martial, SCM (the trial court), in Charge No. NA/COAS/GI/39, delivered on the 20<sup>th</sup> July, 2017 and

confirmed on the 20th October, 2017, wherein AVM J.M. Gabum, who presided over the GCM, sentenced the respondent to reduction in rank and monetary restitution to the appellant.

A resumé of the essential facts of the case, which transformed into this appeal, are disobedient to verbosity and complexity. The respondent was a Major General in the appellant and the Chief of Transformation and Innovation at the appellant's headquarters, Abuja. By a letter, dated the 27<sup>th</sup> September, 2012, the then Chief of Defence Staff (CDS) appointed him as the Defence Headquarters Liaison Officer to the Ministry of Federal Capital Territory (FCT) on comprehensive Development of Asokoro (Annex) District on the basis of land swap. In the course of his occupation of the position, the then Chief of Army Staff (COAS) convened an Investigation Committee to verify ownership of the appellant's additional portion of land behind Mogadishu Cantonment Asokoro, Abuja. Sequel to the report of the Investigation Committee, the then COAS, Lt. General T. Y. Buratai convened the GCM. On the 4<sup>th</sup> July, 2016, the respondent was arraigned before the GCM on a 9-count charge, personally signed by the then COAS, Lt. Gen. T. Y. Buratai, bordering, *inter alia*, on public service property, making false documents and cheating punishable under the provisions of sections 56(2), 66(a), 90(a) and

113(a) of the Armed Forces Act, (AFA), Cap A20, Laws of the Federation of Nigeria, LFN, 2004 respectively.

The respondent pleaded not guilty to all the counts of the charge. In the course of proceedings, the GCM struck out count 9 for being duplicitous with count 3 of the charge. At the closure of the appellant's case before the GCM, the respondent made a no-case submission which succeeded in part as count 5 was struck out. The respondent eventually entered his defence on the remaining 8 counts of the charge. The respondent called 16 witnesses when the GCM ordered him to frontload the depositions of his remaining 61 witnesses. He frontloaded the depositions of 8 of them and asked for the certified true copy of the order to enable him comply with it. The GCM refused his application for adjournment and foreclosed his defence. In a considered judgment, delivered on the 20th July, 2017, documented at pages 3865 - 3892 and 3894 - 3896, volume 8 of the record, the GCM found the appellant guilty, convicted and sentenced him on counts 3, 4, 6, 7 and 8 for reduction in rank and restitution, but acquitted and discharged him on counts 5 and 9 of charge.

The respondent was dissatisfied with the decision. Hence, on the 15<sup>th</sup> November, 2017 and on the 7<sup>th</sup> March, 2018, the respondent launched notices of appeal before the lower court, captured at pages 4874 – 4880 and 5047-5058, volume 10, of the record respectively. The lower court duly heard the appeal. In a

considered unanimous judgment, delivered on the 18<sup>th</sup> April, 2019, reflected at pages 5222 – 5252, volume 10, of the record, the lower court allowed the appeal, set aside the decision of the GCM and ordered a re-trial before it.

The appellant was peeved by the judgment. Consequently, on the 17 May, 2019, it lodged a 3 – ground notice of appeal which is copied between pages 5255 – 5258, volume 10, of the record. The appellant, with the leave of this court granted on the 20<sup>th</sup> March, 2025, filed a 3 -ground amended notice of appeal on the 26<sup>th</sup> Mach, 2025, wherein it prayed for:

- (1) **AN ORDER allowing the appeal**
- (2) **AN ORDER setting aside the judgment of the Court of Appeal, Abuja Judicial Division delivered in Appeal No. CA/A/791c/2017 dated the 18<sup>th</sup> day of April, 2019.**
- (3) **AN ORDER restoring the judgment of the Special Martial delivered on 20<sup>th</sup> July, 2017.**

Thereafter, the parties, through their respective counsel, filed and exchanged their respective briefs of argument in line with the procedure governing the hearing of criminal appeals in this court. The appeal was entertained on the 6<sup>th</sup> November, 2025.

## **Respondent's preliminary objection**

On the 17<sup>th</sup> April, 2025, the respondent confronted the appeal with a notice of preliminary objection wherein he prayed this court to strike out the three grounds of appeal, the amended appellant's brief of argument and the appeal for being incompetent on the following grounds:

- 1. The lower court delivered its judgment on 18<sup>th</sup> April, 2019, setting aside the judgment of the Special Court Martial.**
- 2. Dissatisfied with the decision of the lower court referred to in (1) supra, the appellant appealed to this Honourable Court via a Notice of Appeal filed on 17<sup>th</sup> May, 2019 with three grounds, (see pages 5255 to 5258, vol. 10 of the Record of Appeal.)**
- 3. The entire grounds of Notice of Appeal filed on 17<sup>th</sup> May 2019 are incompetent as they are all grounds of facts, or at best mixed law and facts, for which the requisite leave was not sought and obtained by the appellant.**
- 4. On 19<sup>th</sup> March, 2025, the appellant filed a motion to amend its incompetent Notice of Appeal by deleting ground 3 and replacing same with a new ground 3.**
- 5. The appellant subsequently filed an amended Notice of Appeal on 25<sup>th</sup> March 2025.**

6. **The new ground 3 in the amended Notice of Appeal was in respect of the interlocutory ruling of the lower court delivered on 15<sup>th</sup> March, 2028 on the issue of leave to appeal from Special Court Martial to Court of Appeal.**
7. **The new ground 3 in the Amended Notice of Appeal is incompetent as the ground is in respect of interlocutory ruling for which trinity prayers for leave is required from this court before it can be raised.**
8. **The appellant is also out of time to appeal the interlocutory appeal of the lower court delivered on 15<sup>th</sup> March, 2018 and cannot, by way of amended Notice of appeal, appeal an interlocutory ruling of the lower court.**
9. **The Honourable did not grant the appellant leave to appeal the interlocutory ruling of the lower court out of time before applying to amend its Notice of Appeal to raise the new ground 3 in the amended notice of appeal.**
10. **Ground 3 of the amended Notice of Appeal and Issue 1 of the appellant's brief of argument are incompetent and their inclusion in the amended notice of appeal filed on 26<sup>th</sup> March, 2025 constitutes an abuse of the process of this Honourable court.**

11. The two issues for determination formulated by the appellant in its amended appellant's brief of argument filed on 3<sup>rd</sup> April, 2025 are incompetent at they arose from incompetent grounds of appeal.
12. The Honourable Court lacks the jurisdiction to hear and determine the appellant's appeal on incompetent grounds of appeal.
13. The appellant will not be prejudicated if this Honourable court strike out/dismiss (sic) its entire appeal.

#### Arguments on the objection:

Learned counsel for the respondent, Mamud A. Magaji, SAN, submitted that grounds 1 and 2 of the appellant's original and amended notice of appeal are of mixed law and fact that were filed without leave of court which rendered them incompetent and liable to be struck out. He relied on section 233 (2) and (3) of the Constitution, as amended, **Agonsi v. Ukwu** (2023) 2 NWLR (Pt. 1869) 441; **Regd. Trustees, Mission House Int'l v. All States Trust Bank Plc** (2021) NWLR (Pt. 1805) 275. He asserted that the original notice of appeal, which was incompetent, could not be amended. He cited **Nwaigwe v. Okere** (2008) 13 NWLR (Pt. 1105) 445; **Ogbuji v. Amadi** (2022) 5 NWLR (Pt. 1822) 99. He explained that the ground 3 of the amended notice of appeal was in respect

of an interlocutory ruling which leave of court was not obtained before filing it which rendered it incompetent. He referred to ***SPDCN Ltd. v. Torchi*** (2003) 5 NWLR (Pt. 1878) 499. He reasoned that since the three grounds are incompetent, then the issues formulated therefrom and the appellant's brief based thereon are rendered incompetent and liable to be struck out. He relied on ***Mato v. Hember*** (2017) LPELR – 42765 (SC). He urged the court to strike out the appeal for being incompetent.

For the appellant, learned counsel, Affis Matanmi, Esq., contended that the grounds 1 and 2 of the notice of appeal are competent because they border on breach of right to fair hearing which the appellant can appeal against as of right under section 233(2) (c) of the Constitution, as amended. He relied on ***Nwaolisa v. Nwabufoh*** (2011) LPELR – 2115 (SC); ***General Electric Co. v. Akande*** (2010) 18 NWLR (Pt. 596) 618. He explained that the ground 3 in the original notice of appeal was deleted and replaced with the ground 3 in the amended notice of appeal. He described it as a substitution by addition by an amendment which is allowed in law. He cited suffock ***Petroleum Services Ltd v. Mobil Producing (Nig.) Ltd*** (2022) LPELR – 59163 (SC). He argued, in the alternative, that the ground 3 of the amended notice of appeal is an issue of jurisdiction which the appellant does not need leave to raise it. He referred to ***Onoita v. Texaco Nig. Plc*** (2024) 18

NWLR (Pt. 1970) 171. He urged the court to dismiss the preliminary objection.

### **Resolution of the preliminary objection**

It goes without saying that the respondent (the objector, for short), *qua* counsel, greeted the competence of the appellant's appeal with a stiff opposition on the premises of a preliminary objection, erected on any army of grounds, tredecion grounds, which parades a solitary mission: to abort the life of the appeal *in limine*. To this end, it is important to comprehend the purport and location of a preliminary objection in our accusatorial system of administration of justice which Nigeria, a legatee of common law principles, imported from the Angolo-American legal system.

First, a preliminary objection, a pre-emptive strike that has the potency to pierce the heart of a matter, is a specie of objection which, if sustained or upheld by a court, will render further proceeding or determination in a matter unnecessary and put it to an end, see ***Jim-Jaja v. C. P., Rivers State*** (2013) 6 NWLR (Pt. 1350) 225, ***Amah v. FRN*** (2019) 6 NWLR (Pt. 1667) 160. It is for this reason, possible abrogation of a matter in its infancy on its success, that the law commands the court to first handle a preliminary objection, by according it a premier attention, whenever it is raised in any judicial proceeding before any court in Nigeria, see ***Uwazurike v. A. – G., Fed.*** (2007) 8 NWLR (Pt. 1035) 1; ***Muhammed v. IGP*** (2019) 4 NWLR (Pt. 1663) 492; ***Lalapu v.***

**C./O.P.** (2019) 16 NWLR (Pt. 1699) 476. On this score, I have an abiding obligation to pay due respect to this legal commandment, giving the preliminary objection a prime consideration, in order not to insult the law.

Now, the marrow of the objector's chief *coup de main* against the competency of the appeal, indeed his trump card on the objection, is that the grounds 1 and 2 of the amended notice of appeal, which midwived the appellant's appeal, are grounds of mixed law and fact for which the appellant ought to have sought and obtained leave of court before filing them. The respondent staked his grouse on the allegation that those grounds constitute an infraction of the provision of section 233 (2) and (3) of the Constitution, as amended.

In the first, it is a settled rudimentary law, beyond any peradventure of doubt, that right of appeal is statutorily-allotted to the citizenry by the Constitution and other legislations. That is say right appeal of appeal is a statutory right, see **Garuba v. Omokhodion** (2011) 14 NWLR (Pt. 1269) 145. The Constitution, as amended, the *fons et origo* of all laws, creates categories of rights of appeal from the trial superior courts of record to the Court of Appeal and from the latter to the Supreme Court. They are, *videlicet*: appeal as of right and appeal with leave of court. They are located in sections 241, 242 and 233 of the Constitution, as

amended, see **FRN v. Boko v. Nungwu** (2019) INWLR (Pt. 1654) 395; **Dankofa v. FRN** (2019) 9 NWLR (Pt. 1678) 468.

At this juncture, it is apropos to pluck out the embattled grounds 1 and 2 of the amended notice of appeal which are *in pari materia* with grounds 1 and 2 of the original notice of appeal that are domiciled quietly at pages 5255 – 5257, volume 10, of the mountainous record. The two grounds, pruned of their particulars, read:

#### **GROUND ONE**

**The learned Justices of the Court of Appeal, Abuja Judicial Division erred in law and thereby occasioned miscarriage of justice when their Lordships held thus at page 29, paragraph 2 of the judgment:**

**“I am of the fervent view that irrespective of the circumstances of alleged antics of the appellant in the proceedings referred to by the respondent; the Special Court Martial ought to have granted the adjournment to allow the appellant bring his witness to court. In my avowed view, the failure to the court Martial Tribunal to allow the appellant call all his witnesses, and the decision to foreclose the case of the appellant after the appellant had submitted his intended list of witnesses was in clear breach of the appellant’s right of fair hearing. The**

**Special Court Martial was in error to have deprived the appellant the opportunity to call his listed witnesses in his defence”.**

## **GROUND TWO**

**The lower court erred in law and thereby occasioned miscarriage of justice when it held thus at page 28, paragraphs 2 and 3:**

**“In the instant case, the prosecutor was afforded the opportunity to adequately conduct it (sic) case, undisturbed. However as already shown above; that was not the situation with the respondent, the appellant herein... The Special Court Martial ought to have been patient enough to allow the appellant to get all the witness (sic) listed by the defence to file their witnesses statement on oath”.**

By the same token, the provision of section 233(2) (c) of the Constitution, as amended, which the feuding parties placed high premium in their incompatible contentions, deserves to be culled, *verbatim ac litteratim*, whence it is ingrained firmly in therein. It states:

- 233 (2) An appeal shall lie from decisions of the Court of Appeal to the Supreme Court as of right in the following cases-**

- (c) **decisions in any civil or criminal proceedings on questions as to whether any of the provisions of Chapter IV of this constitution has been, is being or is likely to be, contravened in relation to any person.**

In the expansive legal hemisphere, leave of court, which has become an overworked term in judicial adjudication, signifies permission of court. Where leave of court, trial or appellate, is required before filing an action, a process or ground of appeal, but a party ignores seeking and obtaining the requisite leave before filing same, the action, process or ground is rendered incompetent which incompetence will impinge on the jurisdiction of the court to entertain it. The philosophical basis for the rule is this. The failure to obtain leave disrespects and desecrates the inviolable tertiary ingredient of jurisdiction, *id est*, that an action must be initiated by the due process of law and fulfill any condition precedent to the exercise of jurisdiction of court, see, ***Ugwu v. State*** (2013) 14 NWLR (Pt. 1374) 257; ***Mohammed v. State*** (2018) 13 NWLR (Pt. 1635) 85; ***Dankofa v. FRN*** (2019) 9 NWLR (Pt.1678)468; ***Nweke v. FRN*** (2019) 10 NWLR (Pt. 1679)51.

I have, in an abiding loyalty to the expectation of the law, subjected the grounds 1 and 2 of the amended notice of appeal, catalogued supra, to a microscopic examination with the finery of a

toothcomb. Exultantly, both, though they suffer from some elements of prolixity, are rebellious to woolliness and ambiguity. A communal interpretation of the binary grounds, through the lens of law, reveals clearly that the appellant's agitation against the lower court's decision is canalised within a very narrow compass. They chastise the propriety *vel non* of the lower court's finding that the respondent's inviolate right to fair hearing, which is husbanded jealously by section 36 of the Constitution, as amended, was eroded by the proceeding of the GCM which mothered the appeal before the lower court. Put simply, the appellant's nursed grudge, warehoused in the two grounds 1 and 2, orbits around the legality of the lower court's decision that decreed that the respondent's right to fair hearing was flagrantly defiled by the GCM. In essence, the lower court's decision was one that centred on the provisions of Chapter IV of the Constitution, as amended. Thus, the appellant's appeal, as constituted under the banner of grounds 1 and 2 *supra*, falls squarely within the firmament of appeal as of right as ordained by the provision of section 233(2) (c) of the Constitution, amended. It is the inelastic posture of the law, which dates from antiquity, that a party whose ground of appeal, or appeal, interrogates the correctness of a decision *vis-à-vis* Chapter IV of the Constitution, as amended, in the district of either civil or criminal proceedings, does not require leave of court as a prerequisite to filing it. In that situation, the appeal is as of right.

Hence, the law grants the appellant the unbridled licence to file the notice of appeal, which houses the two grounds 1 and 2, without the necessity of obtaining leave of court before doing so. In other words, the two grounds are not plagued by any atom of incompetence as to magnet the toxic consequence of striking out as canvassed by the objector.

For the sake of completeness, the above finding on the competency of the castigated grounds 1 and 2 of the notice of appeal, whether original or amended, with due reverence, punctures and exposes the poverty of the objector's alluring argument and renders it a footnote. The reason is not far-fetched. In the legal landscape, a ground of appeal, *a fortiori* two grounds of appeal, is potent enough to sustain an appeal with validity. Thus, the competency of grounds 1 and 2 impregnates and oxygenates the appeal with validity and viability. The net effect comes to this. The original notice of appeal was not inflicted with any ounce of incompetence as to make it not amenable to amendment *vis-à-vis* ground three thereof. It stems from this juridical survey, that the objector's characterisation of the appellant's issue three as being tainted with incompetent, because it germinated from grounds 1 and 2, is disabled by the law as dissected above. In effect, all the legion of grounds of the objection are lame. They cannot fly.

Overall, the preliminary objection, which the respondent/objector invented to snuff life out of the appeal in its

embryo stage, flies in the face of the law. Consequently, I overrule the preliminary objection. Accordingly, it is, hereby, dismissed. I will proceed to handle the appeal on its merited merit.

### **Determination of the appeal**

During its hearing, learned counsel for the appellant, A. T. Kehinde, SAN, adopted the amended appellant's brief of argument, filed on the 3<sup>rd</sup> April, 2025, and the appellant's reply brief, filed on the 2<sup>nd</sup> May, 2025, as representing his arguments for the appeal. He urged the court to allow it. Similarly, learned counsel for the respondent, Affis Matanmi, Esq., adopted the respondent's amended brief of argument, filed on the 17<sup>th</sup> April, 2025, as constituting his submissions against the appeal. He urged the court to dismiss it.

In the amended appellant's brief of argument, learned counsel distilled two issues for determination, to wit:

- (1) Whether the Court of Appeal rightly assumed jurisdiction when it heard and determined the appeal before it based on the Respondent's Notice of Appeal filed out of time on 7/03/2018 without leave and or order for extention of time first had and obtained.**
- (2) Whether the Court of Appeal was right when it held that the Respondent's right of fair hearing**

## was breached by the trial Special Court Martial.

Admirably, the respondent's counsel adopted the two issues for determination as crafted by the learned appellant's counsel.

### Arguments on the issues:

#### Appellant's submissions

Learned appellant's counsel submitted that by the provisions of sections 183 and 184 (1) of the AFA, an appellant is required to appeal to the lower court from the decision of the GCM with the leave of the lower court sought and obtained within 40 days of the decision of the GCM. He asserted that the appeal to the lower court, Appeal NO. CA/A/791<sup>C</sup>/2017, which comprised a final decision, filed out of time, on the 7<sup>th</sup> March, 2018, did not comply with those provisions and that deprived the lower court of jurisdiction to hear it. He relied on *Kudiabor v. Kudanu* 6 WACA 14; *NAF v. Shekete* (2002) LPELR – 3139 (SC); *Aderibigbe v. Abidoye* (2009) 10 NWLR (Pt. 1150) 592. He narrated the importance of a notice of appeal and insisted that where it is incurably defective, a court will not have jurisdiction to hear it. He cited *Umezinne v. FRN* (2019) 3 NWLR (Pt. 1660) 536; *Ikponmewem v. Asemota* (2022) LPELR – 565949 ((SC); *FRN v. Dairo* (2015) LPELR – 24 303 (SC). He noted that a notice of appeal is an originating process which cannot be deemed as properly filed and served. He referred to *Ani v. Otu* (2017) 12

NWLR (Pt. 1578) 30; ***Ikponmewem v. Asemota*** (supra); ***Sanni v. The People of Lagos State*** (2022) 4 NWLR (Pt. 1820) 399. He added that the lower court's deeming of the respondent's notice of appeal on the 15<sup>th</sup> March, 2018 did not validate it as one cannot put something on nothing and expect it to stand. He referred to ***Macfoy v. UAC Ltd*** (1961) WLR 3.

Learned Silk contended that the lower court was wrong in holding that the respondent's right to fair hearing was breached by the GCM. He took the view that that the respondent was given the opportunity to present his case, but he opted to dissipate time and energy in filing applications and objections. He persisted that he fully participated in the proceeding with a counsel of his choice and his right to fair was not breached. He cited ***Newswatch Comm. Ltd v. Attah*** (2006) 12 NWLR (Pt. 993) 144; ***Akinduro v. Alaya*** (2007) ALL FWLR (Pt. 281) 163; ***Magit v. Uni-Agic Makurdi*** (2005) LPELR – 1816 (SC); ***Adele v. Ogbonda*** (2007) 71 MJSC 160. He maintained that the respondent was given the opportunity to present his defence but failed, neglected and omitted to continue with it. He added that the GCM exercised its discretion in the refusing the respondent's application for adjournment and foreclosure of his defence which the lower court had no right to intervene. He referred to ***Ogunsanya v. State*** (2011) LPELR – 2349 (SC). He opined that the GCM refused the adjournment and foreclosed the respondent in order to minimise costs of litigation

and unnecessary delay. He relied on **Ndu v. State** (1990) NWLR (Pt. 164) 550. He concluded that the respondent, who was given the opportunity to present his case, waived his right to complain. He cited **Okike v. LPDC** (2005) 7 SCN/596; **MDPDT v. Okonkwo** (2001) 2 SCNJ 186.

### **Respondent's contentions**

Learned respondent's counsel submitted that the respondent obtained leave of court on the 15<sup>th</sup> March, 2018 based on his application that was not opposed by the appellant after filing a counter-affidavit. He said that the appellant was represented by counsel and was bound by his decision. He relied on **Edozien v. Edozien** (1993) LPELR – 1020 (SC); **Ibori v. Agbi** (2004) LPELR – 1402 (SC); **Aliyu v. State** (2021) LPELR – 55002 (SC). He observed that the respondent complied with the provisions of sections 183 and 184 (1) of the AFA. He described the appellant's contention as rooted in technicality which is dead in adjudication. He cited **Adeniji v. State** (1992) 4 NWLR (Pt. 254) 248; **Yusuf v. Adegoke** (2007) 11 NWLR (Pt. 1045) 332. He added that the complaint is based on procedural jurisdiction which it had waived, having participated at the proceeding in the lower court. He referred to **Odu'a Investment Co. Ltd. v. Michael** (2024) LPELR – 62622 (SC). He took the view that the amended notice, filed on the 26<sup>th</sup> March, 2025, does not relate to the ruling of the 15<sup>th</sup> March, 2018, but the final decision of the 18<sup>th</sup> April, 2019. He

asserted that a ground of appeal must relate to a decision or rendered incompetent. He relied on **Messrs Singoz & Co. (Nig.) Ltd. v. U.M.Co. Ltd.** (2022) 18 NWLR (Pt. 1962) 203; **Adamu v. State** (2023) 4 NWLR (Pt. 1873) 127; **Eyigebe v. Iyaji** (2013) LPELR – 20522 (SC). He maintained that the ruling of the 15<sup>th</sup> March, 2018 remains binding on the parties, the appellant not having appealed against it. He described the authorities cited by the appellant as inapplicable to the case.

Learned counsel enumerated the features of fair hearing. He cited **Mohammed v. Olawunmi** (1990) 2 NWLR (Pt. 133) 458; **Ogundoyin v. Adeyemi** (2001) 13 NWLR (Pt. 730) 403; **Saleh v. Monguno** (2003) 1 NWLR (Pt. 801) 221. He narrated the incidents that happened in the GCM and insisted that it breached the respondent's right to fair hearing. He referred to **General Electric Co. v. Akande** (2012) 16 NWLR (Pt. 1327) 593; **Ovunwo v. Woko** (2011) 17 NWLR (Pt. 1277) 522. He canvassed the point that the GCM did not give the respondent the adequate time and facilities to prepare his defence as provided in section 36 (6) (b) of the Constitution, as amended. He relied on **Okoye v. COP** (2015) 17 NWLR (Pt. 1488) 276. He stated that the consequence of breach of a party's right to fair hearing is that the judgment will be set aside. He cited **Okorie v. State** (2018) 11 NWLR (Pt. 1629) 1; **Ovunwo v. Woko** (supra); **Kada v. State** (1991) 8 NWLR (Pt. 181) 522. He explained that the true test of fair hearing is the impression of a

reasonable man, who is present at the trial, is whether from his observation justice has been done. He referred to **Gaji v. State** (1975) 5 SC 61; **R. v. Wintson Simith** (1975) Vol. 61 cr. App. 128; **Danzina v. State** (1995) 9 SCN J 254 (1985) 1 NWLR (Pt. 415) 513; **Josiah v. State** (1985) NWLR (Pt. 1) 125; **Okoduwa v. State** (1988) 2 NWLR (Pt. 76) 333; **Pam v. Mohammed** (2008) 16 NWLR (Pt. 1112) 69.

### Points of law

Learned appellant's counsel posited that the failure to obtain leave of court, before filing a notice of appeal before a court, is not an issue of procedural technicality or jurisdiction as suggested by the respondent. He relied on **LGC Ltd v. Stanbic IBTC Bank Plc** (NO. 2) (2022) 14 NWLR (Pt. 1851). He postulated that parties cannot by consent confer jurisdiction on a court where none exists. He cited **Agbegbolu v. Idowu** (2020) 7 NWLR (Pt. 1722) 94; **Adeniji v. State** (1992) 4 NWLR (Pt. 232) 248; **Yusuf v. Adegoke** (supra). He claimed that the respondent failed to show that he was denied the opportunity to be heard. He referred to **Yusuf v. Kano State** (2023) 10 NWLR (Pt. 1891) 23.

### Resolution of the issues

In due fidelity to the injunction of the law, I will attend to issue one first. The reason is plain. The issue queries the legality of the lower court's assumption of jurisdiction over the respondent's

appeal, Appeal No. CA/A/791<sup>C</sup>/2017, when it was incompetent because it was filed without the requisite leave of court as mandated by the provisions of sections 183 and 184 (1) of the AFA. The law, in its infinite wisdom, compels the courts, sitting on every calibrated rungs of judicial ladder, to grant premier attention to an issue of jurisdiction which is *numero uno* and *supremo* in every adjudication. The *raison d'être* for the mandate is that where a court is drained of the jurisdiction to entertain a matter, the proceeding flowing therefrom, no matter the quantum of diligence, dexterity, artistry, sophistry, transparency and objectivity injected into the proceeding, it will be marooned in the murky ocean of nullity.

Now, the *casus belli inter partes* centres on the necessity or otherwise of obtaining leave of court before the respondent commenced his appeal before the lower court. In hunting for a dispassionate solution to the stubborn issue, I have given a panoramic examination to the respondent's 13 – ground notice of appeal which colonises pages 5047 – 5058, volume 10, of the elephantine record. At once, I have subjected the galaxy of issues, which the respondent presented to the lower court, to a clinical audit. Interestingly, both the battery of grounds and issues are comprehension-friendly. It is gleanable therefrom that the meat of the respondent's grouch centred on his allegation of flagrant breach of his right to fair hearing by the decision of the GCM. The

lower court's decision, which is in the heat of extermination and expunction, concretises my view point supra. Put differently, the nucleus of his complaint was pegged on violation of his fundamental right to fair hearing which is sheltered under Chapter IV of the Constitution, as amended.

Flowing from the fact that the respondent's chief grouse, in his appeal before the lower court which birthed this appeal, came under the canopy of Chapter IV of the Constitution, as amended, and wedded to it, the provision of section 241 (2) (d) of the Constitution, as amended, comes in handy. Hence, I am impelled by law to patronise the determinative provision in the resolution of the knotty issue. This is rationalised by the fact that it is a mirror of the provision of section 233 (2) (c) of the selfsame Constitution, as amended, which I anatomised under the tutelage of the respondent's doomed preliminary objection.

For the fact that the two are twin provisions that run *pari passu* in the province of the Constitution, as amended, I have the blessing of the law to transport my solemn resolution on the provision of section 233 (2) (c) of the Constitution, as amended, which was conducted in due allegiance to the law, to the resolution of this vexed issue. To this end, I hereby adopt, *mutatis mutandis*, my reasoning and conclusion on the interpretation of the provision as mine on this issue. The corollary of that judicial importation of that

conclusion to the determination of this issue is not moot. The respondent, the appellant therein, was clothed with the *vires* to ventilate his nursed grievances against the decision of the GCM in the lower court, via Appeal No. CA/A/791<sup>C</sup>/2017, without any legal obligation to seek and obtain leave of court before its commencement. In a word, the appeal was not infested with any indelible incompetence as to disrobe the lower court of the requisite jurisdiction to entertain it.

My noble Lords, in the spirit of *ex abundanti cautela*, let me place on record, pronto and perforce, that the appellant's invocation/reliance on the provisions of sections 183 and 184 of the AFA to castrate the respondent's appeal before the lower court peters out into the fog of insignificance in the face of the provisions of section 241 (2) (d) of the Constitution, as amended. As a matter of hard law, the potency of those two provisions, which provide for leave of the lower court before a party challenges a decision of the GCM, takes to flight and vaporises into the waiting den of inconsistency on their confrontation and collision with the provision of section 241 (2) (d) supra on the footing of the almighty provision of section 1 (3) of the Constitution, as amended.

In any event, the respondent obtained the leave of the lower court *vis-à-vis* his Appeal No. CA/A/791<sup>C</sup>/2017 on the 15<sup>th</sup> March, 2018 without any tinge of protestation from the appellant. In the

eyes of the law, that leave was a classic exemplification of a surplusage. Presently, the law has not declared any enmity with superfluity. The reason is located in the ancient maxim: *abundantia cautela non nocet* -great caution does no harm. The maxim owes its ancestry to the *Heydon's case* II Co. Rep. 5a at 6B. It has since been transplanted and assimilated in our jurisprudence, see ***Abba-Turkur v. Government of Gongola State*** (1988) ALL NLR 42/(1988) 1 NWLR (Pt. 68) 393 ***FRN v. Dairo*** (2015) 6 NLLR (Pt. 1454) 141.

In the light of the foregoing legal exposition, the lower court's assumption of jurisdiction over the determination of the respondent's appeal, Appeal No. CA/A/791<sup>C</sup>/2017, did not, in the least, fracture the tenets of the law as to be mired in the quicksand of nullity as pontificated by the appellant. It will smell of idolising judicial sacrilege to tinker with a judicial act that is divorced from injudicious exercise. In the end, I have no choice than to resolve the issue one against the appellant and in favour of the respondent.

Having done away with issue one, I proceed to the treatment of issue two. The plinth of the issue is submissive to easy appreciation. It castigates the lower court's decision which declared that the respondent's right to fair hearing was breached by the GCM. The lower court's decision, sought to be impugned and ostracised from the legal domain, monopolises pages 5222 – 5254,

volume 10, of the windy record. Being the cynosure of the nagging issue, it is germane to invite, at the risk of prolixity but borne out necessity, the relevant portion of the decision. At pages 5249 – 5251, vol. 10, of the stupendous record, the lower court proclaimed:

**In criminal cases, premium must be given to an accused person to effectively conduct his defence without undue haste by the court. It is true that adjudication of cases in special court martial envisages quick dispensation of justice. However, it is instructive to emphasise that quick dispensation of cases must not be sacrificed at the altar of justice. The Special Court of Martial ought to have been patient enough to allow the appellant to get all the witness listed by the defence to file their witnesses' statement oath. On the filing of such statements, the court would then be in a position to direct the conduct of the case and determine whether the evidence of the witnesses is merely repetitive. Equal opportunities must be afforded all parties to fully conduct their cases in court. In the instant case, any reasonable independent observer would have come to the conclusion that the appellant was not accorded adequate fair hearing.**

I am of the fervent view that, irrespective of the circumstances of alleged antics of the appellant in the proceedings referred to by the respondent, the Special Court Martial ought to have granted the adjournment to allow the appellant bring his witnesses to court. In my avowed view, the failure of the Court Special Tribunal to allow the appellant call all his witnesses, and the decision to foreclose the case of the appellant after the appellant had submitted his intended list of witnesses was in clear breach of appellant's right of fair hearing. The Special Court Martial was in error to have deprived the appellant the opportunity to call his listed witnesses in his defence.

The right to fair hearing lies at the heart of adjudication; therefore, a finding that a party was denied fair hearing nullifies an entire proceeding, including the decision arising therefrom. I hereby declare the entire proceedings, including the judgment which convicted the appellant; null and void. Where a court declares a proceeding a nullity, the appropriate order to be made by an appellate court is for a hearing *de novo*. See, *Okafor v. A. E, Anambra State* (1991) 6 NWLR (Pt. 200) 659 at 678, *Omokuwajo v.*

**FRN (2013 9 NWLR (Pt. 1359) 300 at 340, *Ariori Vugor v. State* (2014) 2 NWLR (Pt. 1390) 196 at 207, *Josiah v. State* (1985) 1 NWLR (Pt. 1) 125. In the circumstances, I hereby set aside the proceedings and judgment of Special Court Martial in respect of Charge No. NA/COAS/G1/39 filed before the lower Special Court Martial. In view of the circumstances of this case, bearing in mind the evidence adduced against the appellant, the interest of justice, demands a re-trial of the appellant.**

It admits of no argument that fair hearing is the mainstay of this thorny issue. It is important to comb out from the warehouse of the case law and display some of the notable hallmarks of fair hearing, a concept that has graduated to a common place in our *corpus juris* and strides to compete with jurisdiction on which to arrest the prime attention of the court in adjudications.

To being with, fair hearing denotes a trial which is conducted in accordance with all the legal rules formulated to ensure that justice is dished out to parties to the case, see ***Eze v. FRN* (2017) 15 NWLR (Pt. 1589) 433; *Akingbola v. FRN* (2018) 14 NWLR (Pt. 1640) 395; *La Wari Furniture & Baths Ltd. v. FRN* (2019) 9 NWLR (Pt. 1677) 262.**

Indisputably, fair hearing is an ancient concept which traces its paternity to divinity. In ***R. v. Chancellor of University of***

**Cambridge** (1723)/STRA 557, Fortesue, J. held that God never condemned Adam before calling upon him to make his defence. It was a common law doctrine which has metamorphosed into our jurisprudence and firmly propagated in section 36 of the Constitution, as amended. It donates to the citizens the inviolate right to ventilate their grievances, in the temple of justice and before any administrative body, on the altar of the two concrete pillars of natural justice: *audi alteram partem* – hear the other side - and *nemo iudex in causa sua* – no one should be a judge in his own case. The whole essence of fair hearing, which is co-extensive with fair trial, connotes giving parties to any proceedings, be it judicial, quasi-judicial or administrative, an equal opportunity to present their cases. It follows that fair hearing is not coterminous with correctness of a decision. It centres on the cardinal principle that a reasonable man who watched any proceedings, before a court or administrative or quasi judicial body, should conclude that it exhibited an even handedness/fairness in apportioning justice to the parties, see **Kim v. State** (1992) 4 NWLR (Pt. 233) 17; **Newswatch Comm. Ltd. v. Atta** (2006) 12 NWLR (Pt. 993) 144; **FRN v. Akabueze** (2010) 17 NWLR (Pt. 1223) 525; **Nigeria Navy v. Labinjo**(2012) 17 NWLR (Pt. 1328) 56; **Olayioye v. Oyelaran I** (2019) 4 NWLR (Pt. 1662) 351. In **Pam v. Mohammed** (2008) 16 NWLR (Pt. 1112) 1 at 69, Tobi, JSC, of the blessed

memory, described the features of a reasonable man in these illuminating words:

The reasonable person and the impartial observer mean the same. They mean a complete stranger, an unbiased person to the proceedings. A reasonable person is a person with reason having a faculty of the mind by which he distinguishes truth from falsehood, good from evil. A reasonable person is a fair, proper and just and unbiased person. An impartial observer is not partial. He favours neither the plaintiff nor the defendant. He is disinterested in the matter, as he treats both the plaintiff and the defendant alike. He is an unbiased person. Both the reasonable person and the impartial observer are like hypothetical legal standard for determining or judging fairness, fair play and equity. The test of the reasonable man in Nigerian courts is no more the man at the Clapham junction in London but one in anywhere in the Nigerian Cities.

*Nota bene*, this court, in **Baba v. N.C.A.T.C.** (1991) 5 NWLR (Pt. 192) 388 at 423, per Nnaemeka-Agu, JSC, invented and calibrated the parameters to guide the courts to ensure fair hearing in these illuminating words:

In a Judicial or quasi-Judicial body, a hearing, in order to be fair, must include the right of the person to be affected:

- (i) to be present all through the proceedings and hear all the evidence against him;
- (ii) to cross-examine or otherwise confront or contradict all the witnesses that testify against him;
- (iii) to have read before him all the documents tendered in evidence at the hearing;
- (iv) to have disclosed to him the nature of all relevant material evidence, including documentary and real evidence, prejudicial to the party, save in recognised exceptions;
- (v) to know the case, he has to meet at the hearing and have adequate opportunity to prepare for his defence; and
- (vi) to give evidence by himself, call witnesses if he likes, and make oral submissions either personally or through a counsel of his choice.

See, also, **S & D Const. Co. Ltd. v. Ayoka** (2011) 13 NWLR (Pt. 1265) 487; **JSC, Cross River State v. Young** (2013) 11 NWLR (Pt. 1364) 1; **Olayioye v. Oyelarin I** (2019) 4 NWLR (Pt. 1662) 351; **La Wari Furniture & Baths Ltd. v. FRN** (2019) 9 NWLR (Pt. 1640) 395.

In due pacification of the desire of the law, I have consulted the record, the spinal cord of the appeal. My port of visit is at the residence of the proceeding before the GCM during the gestation period of the respondent's defence of the charge levelled against him. I have subjected the proceedings to a merciless scrutiny. First, whilst the appellant fielded witnesses that offered *viva voce* testimony-in-chief, the GCM ordered the respondent to call his remaining 61 witnesses, outside the 16 he had called, through the instrumentality of statements on oath/depositions. That was a quintessence of provision of unequal treatment and opportunity to the respondent as his witnesses could not testify on his behalf "on the same conditions as those applying to witnesses called by the prosecution" as ordained by the provision of section 36 (6) (d) of the Constitution, amended. Second, the respondent frontloaded the depositions of 8 witnesses and requested for time to comply fully with the order of the GCM due to certain unavoidable difficulties not occasioned by him. The GCM refused the application and proceeded to foreclose his defence. That was a clear and ample demonstration of a truncation of the respondent's defence which is offensive to the provision of section 36(6) (b) of the Constitution, as amended, which decrees that an accused person, such as the respondent, must be given adequate time and facilities for the preparation of his defence, see **Okoye v. COP** (2015) 17 NWLR (Pt. 1488) 276.

It cannot be gainsaid that given these critical lacunae, harvested from the proceedings of the GCM, its decision on the charge preferred against the respondent, as an accused person, which was nullified by the lower court, was/ is a *pessimi exempli* of a lopsided decision. The constitutional doctrine of fair hearing, which owes its pedigree to divinity, mandates all the courts, in the adjudicative pyramid, to always create a congenial, egalitarian and hospitable milieu for parties to ventilate their perceived grievances in the temple of justice. It decrees, under pain of nullity of proceeding in default, that courts shall accord equal treatment, opportunity and consideration to the cases of a parties. This is encapsulated in the *maxim: Audi alteram partem*. In the determination of legal rights of parties, justice must not only be done but must be manifestly and undoubtedly seen to be done. Indubitably, the GCM's proceeding, which birthed its decision that mothered the respondent's appeal before the lower court, unjustifiably treated these hallowed and agelong principles of fair hearing with disdain and contempt against the respondent. Indubitably, a reasonable man, who the law has crowned with the deserved crest of neutrality and whose reasoning faculty is the barometer to measure the presence or absence of fair hearing in adjudication, will certainly castigate the proceeding before the GCM as one that constitutes a serious affront to the doctrine of fair

hearing as conserved by the provision of section 36(1) and (6) of the Constitution, as amended.

There is a crying need to emphasise, perforce, that in view of those loopholes, harnessed from the proceedings of the GCM, the ensuing decision therefrom trampled and curtailed the respondent's sacred right to fair hearing as enshrined in the sacrosanct provision of section 36(1) and (6) of the Constitution, as amended-the grundnorm of our law. Put simply, the respondent discharged the burden to prove a denial of fair hearing which the law has cast on him, see **Maikyo v. Itolo** (2007) 13 NWLR (Pt. 1265) 487. The law does not require the respondent to prove damages or losses he incurred consequent upon a breach of his right to fair hearing, see **Oshiomole v. Airhiavbere** (2013) 7 NWLR (Pt. 1353); **Olayioye v. Oyelaran I** (supra). A proof of breach of right to fair hearing, as happened in the case which parented the appeal, carries with it a miscarriage of justice. Put differently, a miscarriage of justice is inherent in a breach of a right to fair hearing, see **Mpama v. FBN Plc.** (supra) **Eze v. Unijos** (2017) 17 NWLR (Pt. 1593) 1; **Thomas v. FJSC** (2019) 7 NWLR (Pt. 1671)284.

It is rudimentary law that where a party's inviolable right to fair hearing is flouted, as in this case, the entire proceeding will be trapped in the intractable web of nullity, see; **La Wari Furniture &**

**Baths Ltd. v. FRN** (supra). This is a confluence point where want of fair hearing and jurisdiction embrace themselves to vitiate proceedings that give birth to a denial of fair hearing, see **Aba v. Monday** (2015) 14 NWLR (Pt. 1480) 569.

Incontestably, in the legal sphere, nullity denotes: “Nothing; no proceeding; an act or proceeding in a case which the opposite party may treat as though it had not taken place; or which has absolutely no legal force or effect”, see **Lasisi v. State** (2013) 12 NWLR (Pt.1367) 133 at 146, per Ngwuta JSC. Nullity bears the stigma of dismal consequence in law. If a decision or proceeding is smeared with any tinge of nullity, it is void and taken as if it was never given or made, see **Okoye v. Nigeria Const. & Furniture Co. Ltd.** (1991) 6 NWLR (Pt. 199) 501; **Bello v. INEC** (2010) 8 NWLR (Pt. 1196) 342. According to the law, a null decision or proceeding does not shower any ounce of enforceable right on its beneficiary party, who is armed with it, nor does it impose any obligations on its victim party, see **Ajibola v. Ishola** (2006) 13 NWLR (Pt. 998) 628; **Oyeneyin v. Akinkugbe** (2010) 4 NWLR (Pt. 1184) 265. Hence, the bounden duty of a court is to set aside, a null decision in that it does not exist in law, see **Oyeyemi v. Owoeye** (2017) 12 NWLR (Pt. 1580) 364.

My noble Lords, for the sake of completeness, the order to make when a person breaches a party’s unassailable right to fair

hearing, as engraved in section 36(1) of the Constitution, as amended, is plain. The settled position of the law is that “once there is such a denial of the said right {right to fair hearing} the only order that could be made on appeal is one for re-trial or re-hearing. This is to enable the appellant to be properly heard,” see **Kalu v. State** (2017) 2 NWLR (Pt. 1442) 522 at 547, per Nweze, JSC (of blessed memory); **Akingbola v. FRN** (supra). Furthermore, once an appellate court intends to order, or orders, for a *de novo* hearing, the law forbids it from treating any other issues in the appeal so as not to prejudice any point that may sprout out for consideration during the rehearing proceedings, see **Karaye v. Wike** (2019) 17 NWLR (Pt. 1701) 355.

Flowing from this extensive *tour d’ horizon* on fair hearing, conducted in due consultation with the law, the decision of the GCM, delivered on the 20<sup>th</sup> July, 2017, was enveloped in the dense fog of nullity with the dismal consequence attendant thereto. In so far as that decision, GCM’s, was enmeshed in the nest of nullity, on account of unwarranted infringement of the respondent’s inalienable right to fair hearing as entrenched and guaranteed under the provision of section 36(1) and (6) of the constitution, as amended, the lower court was *firma terra* in law, on the footing of the doctrine of *ex debito justitiae*, to mow down the null decision with its unbiased judicial sword and supplant it with a deserved

accompanying order of *de novo* trial of the respondent, on the charge, before the a differently constituted GCM. In essence, the decision of the lower court was in total alignment with the criminal jurisprudence, especially on the corrosive consequence of defilement of the provision of section 36 (1) and (6) of the Constitution, as amended. It will tantamount to transgression of the law for this court to tinker with a decision that never disclosed any grain of hostility to the letters and spirit of the law. Based on the foregoing premises, I dishonour the appellant's invitation, though an enticing and salivating one, to crucify and sacrifice the lower court's decision on the underserved altar of improper application of the cardinal principles of fair hearing against its case. As a result, I have no option than to resolve the issue two against the appellant and in favour of the respondent.

On a side note, this is an ectopic lesson for a trial court that is wont to fracture the known rules of natural justice – especially the *audi of acteram partem* - by jettisoning the legally accepted measured speed with which court processes travel in adjectival law. Such an injudicious act emasculates and drowns the tall expectation of the law on prompt delivery of justice. This is because, it will breed a legal paradox whereby the trial court will be compelled to attend to the case *de novo* with the attendant whips and scorns of time, exhaustion of finance, patience, courage and

hope. The overall speed in the determination of such a matter will transfigure into a millipede pace- a serious *coup de grace* to the expected speedy dispensation of justice. Judicial patience, one of the foremost hallmarks of a *judex*, is the panacea!

On the whole, having resolved the duo issues against the appellant, the destiny of the appeal is obvious. It is destitute of any morsel of merit and deserves the reserved penalty of dismissal. Consequently, I dismiss the appeal. Accordingly, the judgment of the lower court, in Appeal No. CA/A/791<sup>C</sup>/2017, delivered on the 18<sup>th</sup> April, 2019, which set aside the decision of the GCM and ordered a retrial of the respondent, in Charge No. NA/COAS/G/1/39, delivered on the 20<sup>th</sup> July, 2017, is, hereby, affirmed in its entirety.



OBANDE FESTUS OGBUINYA,  
JUSTICE, SUPREME COURT.

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